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No. 03-394

Supreme Court, U.S.
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In The Supreme Court of the United States

AMBASE CORPORATION,
A Delaware Corporation,

Petitioner,

v.

CITY INVESTING COMPANY LIQUIDATING TRUST, as successor to City Investing Company, a dissolved Delaware Corporation, JOHN J. QUIRK, Trustee of City Investing Company Liquidating Trust, MARION SCHARFFENBERGER, Executrix of the Estate of George T. Scharffenberger, EBEN W. PYNE, Individually and as Trustee of the City Investing Company Liquidating Trust, and LESTER J. MANTELL, Individually and as Trustee of the City Investing Company Liquidating Trust,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONER

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14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Blonder-Tongue Labs., Inc. v. University of Illinois Found., 402 U.S. 313 (1971) 7

Brown v. United States, 356 U.S. 148 (1958) 6

Conboy v. AT&T, 241 F.3d 242 (2d Cir. 2001) 6

Davignon v. Clemney, 322 F.3d 1 (1st Cir. 2003) 7

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 10

Freytag v. Commissioner, IRS, 501 U.S. 868 (1991) 6

Johnson v. Zerbst, 304 U.S. 458 (1938) 5, 6

Marrese v. American Acad. of Orthopaedic Surgeons, 470 U.S. 373 (1985) 9

SafeCard Servs., Inc. v. American Express Travel Related Servs. Co., 203 A.D.2d 65 (N.Y. App. Div. 1994) 9

Sales v. Grant, 224 F.3d 293 (4th Cir. 2000), *cert. denied*, 532 U.S. 1020 (2001) 6

Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) 9

Singleton v. Wulff, 428 U.S. 106 (1976) 7

Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 9

Tueros v. Greiner, 343 F.3d 587 (2d Cir. Sept. 12, 2003) 5

United States v. Olano, 507 U.S. 725 (1993) 6

Warner v. Buffalo Drydock Co., 67 F.2d 540 (2d Cir. 1933), *cert. denied*, 291 U.S. 678 (1934) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

N.Y. CIVIL PRACTICE LAW & RULES § 202 8

FED. R. CIV. P. 8(c) 5, 6, 7

FED. R. CIV. P. 12 5

Full Faith and Credit Act, 28 U.S.C. § 1738 9

REPLY BRIEF FOR THE PETITIONER

1. City's Opposition ("Opp.") does not contest that AmBase has identified a circuit split over an issue that is worthy of this Court's review – namely, whether a court of appeals may sua sponte raise and apply a defense of res judicata that was never raised in either the district court or on appeal. Nor does City contest that the Second Circuit did in fact act sua sponte to raise and apply the defense of res judicata, even though City never raised that defense before the district court or at any time on appeal. Indeed, it bears emphasizing that the parties agree (and there can be no dispute in light of the decision itself) that the ground for the Second Circuit's decision – that the Delaware statute of limitations' dismissal had *claim* preclusive effect on the New York action – had absolutely nothing to do with the entirely distinct defense of collateral estoppel, or *issue* preclusion. Thus, while City raised the defense of issue preclusion before the trial court, it does not deny that it never raised the defense of claim preclusion (or res judicata), nor does it deny that the Second Circuit based its decision *solely* upon that never-raised defense.

Nevertheless, while effectively conceding the existence of a circuit split that warrants review by this Court, City argues that the Second Circuit's decision does not fit within that split because, City claims, its right to invoke res judicata at a later stage in the proceedings was never actually waived: City argues both that it did not expressly disclaim the defense, and that it was never required to affirmatively raise the defense because it never filed an answer. Opp. 15-21. The unambiguous record easily defeats both arguments (*see infra*). Furthermore, because there is no dispute that the Second Circuit raised and applied the affirmative defense of res judicata that was never once raised by the defendant, either at trial or on appeal, there likewise can be no doubt that its decision

squarely presents this Court with the federal procedural and constitutional issues created by the circuit split outlined in the Petition for Writ of Certiorari ("Pet.") 8-22.

a. City accuses AmBase of presenting "a misleading distortion of the record," because "[c]ontrary to AmBase's posturing before this Court, AmBase was fully aware throughout the litigation that City Trust sought to rely on whatever preclusive effect the Trust could secure from Chancellor Strine's opinion." Opp. 19. While it does not deny having twice explicitly represented to the District Court that it "has *never* raised *res judicata*, or claim preclusion, as a basis for dismissal of this case," Pet. 7 (quoting Appendix to the Petition for a Writ of Certiorari ("App.") 61a) (emphasis added); *see also* App. 63a, it argues that this disclaimer was given only in the "limited context" of advancing its collateral estoppel, or "issue preclusion" defense. Opp. 20. But that "limited context" is precisely what proves the point beyond all doubt: City could not have been more emphatic, or more unequivocal, in its insistence that the defense of issue preclusion (collateral estoppel) and claim preclusion (res judicata) are totally "distinct," and that it was *only* advancing the former, not the latter.

The record could not be clearer. City's motion to dismiss AmBase's New York Complaint argued that the Delaware Court indicated that AmBase could have brought the action as early as 1986, and that therefore the New York court was bound by the doctrine of collateral estoppel to accept that as a finding. Appendix to Respondents' Brief in Opposition to Petition for a Writ of Certiorari ("Resp. App.") A-10. In response, AmBase argued that the Delaware court did not "necessarily decide" anything at all with respect to 1986, but instead based its decision solely on the ground that AmBase was on inquiry notice "no later than December 1996." Resp. App. A-24 – A-27; App. 50a. While December 1996 was outside of Delaware's *three*-year statute of limitations, it was not outside New York's *six*-year

statute of limitations, since the New York complaint was filed in January of 2001. Thus, the Delaware dismissal had no issue preclusive effect on the New York action, – as the district court later held, "Chancellor Strine did not fix the exact date when the claims accrued." App. 29a.

In a subsequent round of briefing, AmBase once again explained that issue preclusion could not possibly apply, but also explained, for good measure and even though the issue was not raised, that *claim* preclusion also could not apply, since the Delaware dismissal on statute of limitations' grounds was clearly *not* a decision "on the merits." Resp. App. A-29 – A-31. As both parties agree, the defense of claim preclusion requires there to have been a dismissal "on the merits," whereas the "distinct" defense of "issue preclusion" does not. *See* Resp. App. A-36 – A-37. Thus, by emphasizing that the Delaware dismissal was clearly *not* a dismissal "on the merits," AmBase directly confronted City with the reason why the law prevented it from ever even insinuating that the Delaware decision supported a claim preclusion (or res judicata) defense.

In response to this direct confrontation, City simply abdicated: it did not contend or suggest that the Delaware statute of limitations dismissal might somehow constitute a decision "on the merits," and it did not contend or even suggest that the Delaware decision might possibly give rise to a res judicata defense. Nor did it even reserve the issue for future argument. Rather, it emphatically demurred, arguing that AmBase had "confuse[d] the separate doctrines of *res judicata*, which the Trust did not raise, and collateral estoppel, which is applicable to the findings of Vice-Chancellor Strine." Resp. App. A-35. Lest there be any confusion, repeatedly throughout its brief City insisted that it was *not* raising the res judicata defense:

> The Trust has never argued that *res judicata* bars AmBase from bringing a claim in New York because the claim was previously dismissed in

> Delaware on statute of limitations grounds. *The Trust's position is only that the Delaware court's factual findings are entitled to issue preclusive effect in this Court.*

Resp. App. A-38 (emphasis added).

Moreover, in response to AmBase's argument that, under Delaware law, a dismissal on statute of limitations grounds is *not* a dismissal "on the merits," City all but explicitly conceded the point:

> Claim preclusion is ordinarily created by a judgment on the merits. However, it is black-letter law that a question of fact actually litigated and resolved in a prior proceeding is entitled to *collateral estoppel* effect – *even if the prior case is dismissed on statute of limitations grounds.* The Delaware Supreme Court has explicitly recognized the difference between *res judicata* and collateral estoppel, and has given preclusive effect to findings of fact even though the previous court did not adjudicate plaintiff's claims on the merits.

Resp. App. A-37 (citations omitted) (second emphasis added). Likewise, City acknowledged the Delaware cases holding that a statute of limitations' dismissal in one jurisdiction is not res judicata in another jurisdiction, and even described that rule of law – which directly undermines its ultimate victory in the Second Circuit – as "unsurprising[ ]." Resp. App. A-37 (addressing *Cappello v. Patrician Towers, Inc.*, No. 102, 1981 Del. LEXIS 272 (Del. Jan. 14, 1981) and *Equity Corp. v. Groves*, 53 A.2d 505 (Del. Ch. 1947)). As explained in the Petition, these "unsurprising" cases are the very ones that AmBase was unable to present to the Second Circuit before it rendered its very "surprising" res judicata decision, and which would almost necessarily have demonstrated to the panel why res judicata was inapplicable. After all, City's only answer to these cases was to insist that they were inapposite because it "has never raised *res judicata*, or claim

preclusion, as a basis for dismissal of this case." Resp. App. A-36.

Thus, when confronted with the argument and the authorities that directly defeat the res judicata defense on which it ultimately prevailed in the Second Circuit – the very same arguments and authorities that AmBase was denied the opportunity to present to the Second Circuit – City's only answer was to insist that it was not advancing a res judicata defense, but was instead only arguing collateral estoppel. If that is not an express waiver of an affirmative defense, it is hard to imagine what could be.

b. City also argues that it cannot have waived the affirmative defense of res judicata because it has yet to file an answer in this case. Opp. 15-18. Because FED. R. CIV. P. 8(c) "applies only to 'pleadings,'" and because Rule 12 motions to dismiss are not included in the definition of "pleadings," City maintains that it was never obligated to raise res judicata, and therefore cannot be deemed to have waived that defense. Opp. 15.

This technical argument completely overlooks the fact that, as explained above, City expressly disclaimed the res judicata defense before the District Court. Moreover, this express disclaimer was given in the context of a second round of briefing, after the briefing on the initial motion to dismiss, and after the trial judge had explicitly permitted the parties to refer to matters outside the four corners of the brief, practically converting the briefing into a summary judgment motion. *See* Joint Appendix in *AmBase Corp. v. City Investing Liquidating Trust*, No. 02-7230 (2d Cir. filed June 3, 2002) 434-847 (attachments to briefing before District Court). There can be no doubt that this express disclaimer constituted an "intentional relinquishment or abandonment of a known right," and therefore constituted a clear waiver of the defense. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Tueros v. Greiner*, 343 F.3d 587, No. 02-2119, 2003 U.S. App. LEXIS 18936, at *14 (2d Cir. Sept. 12, 2003) (because argument was "expressly

disclaimed" it was held "to have been abandoned"); *Conboy v. AT&T*, 241 F.3d 242, 254 (2d Cir. 2001) (claims not surfaced in motion to dismiss briefing held to be waived). This express *waiver* obviates the question whether City also *forfeited* the res judicata defense simply by failure to raise it. *See, e.g., Freytag v. Commissioner, IRS*, 501 U.S. 868, 894 n.2 (1991) (explaining difference between waiver, which is an "'intentional relinquishment,'" and forfeiture, which can be accomplished "by means short of waiver") (Scalia, J., concurring) (quoting *Johnson*, 304 U.S. at 364); *United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture."). Furthermore, that City disclaimed res judicata in a self-serving effort to avoid the arguments that defeat the defense makes it especially important to treat its express disclaimer as a final waiver of its right to raise res judicata. *Cf. Brown v. United States*, 356 U.S. 148 (1958) (holding that when defendant took stand in own defense, she waived right of self defense); *Freytag*, 501 U.S. at 894-95 (discussing dangers of "sandbagging" caused by failing to enforce waiver rule).

The case law City cites holds merely that defendants who have *not* disclaimed their right to an affirmative defense may raise it in an answer filed subsequent to the denial of a pre-answer motion to dismiss. Opp. at 17-18. None of these authorities speak to the situation where, in the course of briefing the motion to dismiss based upon a closely related affirmative defense, the defendant expressly disclaimed any reliance upon the defense in question. In that situation, it cannot be that Rule 8(c) *saves* an otherwise expressly disclaimed defense. To the contrary, even where defendants have technically complied with the Rule 8(c) requirement of raising an affirmative defense in their answer, if the defendant's *conduct* has evidenced a waiver of that defense, the defendant will be held to that waiver. *See, e.g., Sales v. Grant*, 224 F.3d 293 (4th Cir. 2000), *cert. denied*, 532 U.S. 1020 (2001) (affirmative defense set forth in answer waived through failure to

raise it in subsequent proceedings despite ample opportunity to do so).

More generally, "Rule 8(c) is designed to provide plaintiffs with adequate notice of a defendant's intention to litigate an affirmative defense, thereby affording an opportunity to develop any evidence and offer responsive arguments relating to the defense." *Davignon v. Clemney*, 322 F.3d 1, 15 (1st Cir. 2003); *see also Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 350 (1971). Most circuits have concluded that these principles would be violated if an appellate court were to raise an affirmative defense on appeal sua sponte, when the defendant itself had never raised it. *See* Pet. 25 n.13. Other circuits, however, have split from this authority, and have held that it is permissible to raise such a defense sua sponte, though these courts differ as to whether or not the opposing party must at least be given notice and opportunity to rebut the argument. *See* Pet. 10-14. By surprising AmBase with an affirmance based solely upon a never-argued and expressly-disclaimed res judicata defense, the Second Circuit aligned itself with the most extreme of these latter authorities, taking the view that it may apply res judicata without even giving the plaintiff notice and opportunity to address it. Especially since it did so in the face of City's express disclaimer of the defense, and especially since that disclaimer was given because City effectively recognized the dispositive legal obstacle to raising the defense, the Second Circuit's decision presents the foregoing circuit split in a context that manifests all of the problems related to such sua sponte action, and that is therefore worthy of certiorari.[1]

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[1] At an absolute minimum, City's disclaimer made it impossible for it to raise res judicata on appeal, *see generally Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal

(Continued on following page)

2. The clearest sign that City has absolutely no answer to the Petition is the fact that it devotes over two pages of its Statement and almost half of its Argument to the proposition that AmBase should have been dismissed under a New York statute *that City never even bothered to cite in the courts below*. *See* Opp. 8-10, 11, 14-15, 21-22, 26. There, City consistently argued that *New York*'s statute of limitations applied to AmBase's New York action, and never once cited to the New York "borrowing statute," N.Y. CIVIL PRACTICE LAW & RULES ("CPLR") § 202, nor argued that it required the application of *Delaware*'s limitations period. *See* Resp. A-8 – A-19 (arguing that New York statutes of limitation applied to AmBase's complaint). Now, without a hint of irony, City argues that this Court should ignore AmBase's claim that its rights were violated by a dismissal based upon an argument that it never had an opportunity to address and that was plainly wrong as a matter of law, because there is *another* argument that AmBase has never had a chance to address that – if left unaddressed – could also be used as a basis for a (plainly erroneous) dismissal. Indeed, City even has the gall to express outrage that AmBase did not address CPLR § 202 in its Petition – normally, however, it is not necessary to address statutes that one's opponent has seen fit not to cite in *any* of its trial or appellate briefs, and that neither the trial nor appellate court cared to cite. As confirmed by City's consistent decision not to raise it before now, CPLR § 202 does not require application of Delaware's statute of limitations: given that the contract between City and AmBase that is at issue expressly stipulated that all disputes would be governed by New York law, that City's principal place of business is in New York, and that the

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appellate court does not consider an issue not passed upon below."), so that the Second Circuit's sua sponte raising of the defense presents the circuit split even if the defense was not technically waived.

actions giving rise to AmBase's claims occurred in New York, the claims advanced by AmBase's Complaint undoubtedly accrued in New York.

3. City makes essentially no effort to contest that by giving a Delaware statute of limitations' dismissal res judicata effect in New York, the Second Circuit erred, and contradicted what this Court has called the "traditional rule . . . that dismissal on that ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitation periods." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001). Instead, City argues that this error was purely a misinterpretation of state law, and hence of no interest to this Court. Opp. 22-26. That is not correct. First, this Court has made clear that "it is for federal law, not state law, to prescribe the measure of credit which one state shall give to another's judgment," and that an abdication of such federal law oversight "risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause . . . to prevent." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 271 n.15, 272 (1980). Moreover, this Court has held that the Full Faith and Credit Act, 28 U.S.C. § 1738 – which is, after all, a federal statute – mandates that "a federal court is not free to accord greater preclusive effect to a state court judgment than the state courts themselves would give to it." *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 387 (1985) (Burger, C.J., concurring) (citation omitted). *See also* Pet. 23 n.9 & 25 n.13.

Second, City ignores AmBase's point, Pet. 25 n.13, that the Second Circuit's decision abandons a long tradition in New York courts holding that "[a] dismissal on statute of limitations grounds by another state would not, by itself, bar the bringing of an action *in this state* on res judicata grounds." *SafeCard Servs., Inc. v. American Express Travel Related Servs. Co.*, 203 A.D.2d 65, 66 (N.Y. App. Div. 1994) (emphasis added); *see also Warner v.*

Buffalo Drydock Co., 67 F.2d 540 (2d Cir. 1933), *cert. denied*, 291 U.S. 678 (1934) ("The decisions of the Supreme Court and the English cases all indicate that the judgment of the court of a foreign state which dismisses a cause of action because of the statute of limitations of the forum is not a decision upon the merits and is not a bar to a new action upon the identical claim in the courts of another state."). By eviscerating this "traditional rule" of the New York state courts, the Second Circuit's decision contradicts the federal law principles set forth in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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